PART 1 PRELIMINARY INSTRUCTIONS

1.01 Duties of the Jury

[Updated: 6/14/02]

Ladies and gentlemen: You now are the jury in this case, and I want to take a few minutes to tell you something about your duties as jurors and to give you some instructions. At the end of the trial I will give you more detailed instructions. Those instructions will control your deliberations.

It will be your duty to decide from the evidence what the facts are. You, and you alone, are the judges of the facts. You will hear the evidence, decide what the facts are, and then apply those facts to the law I give to you. That is how you will reach your verdict. In doing so you must follow that law whether you agree with it or not. The evidence will consist of the testimony of witnesses, documents and other things received into evidence as exhibits, and any facts on which the lawyers agree or which I may instruct you to accept.

You should not take anything I may say or do during the trial as indicating what I think of the believability or significance of the evidence or what your verdict should be.

Comment

(1) This instruction is derived from Ninth Circuit Instruction 1.01.

(2) "[J]urors may have the power to ignore the law, but their duty is to apply the law as interpreted by the court, and they should be so instructed." United States v. Boardman, 419 F.2d 110, 116 (1st Cir. 1969) (citing Sparf & Hansen v. United States, 156 U.S. 51 (1895)). Thus, while a jury may acquit an accused for any reason or no reason, see Horning v. District of Columbia, 254 U.S. 135, 138 (1920) ("[T]he jury has the power to bring in a verdict in the teeth of both law and facts."), trial judges may not instruct the jurors about this power of nullification. United States v. Manning, 79 F.3d 212, 219 (1st Cir. 1996); United States v. Sepulveda, 15 F.3d 1161, 1190 (1st Cir. 1993) (citing United States v. Desmarais, 938 F.2d 347, 350 (1st Cir. 1991) (collecting cases)); see also United States v. Garcia-Rosa, 876 F.2d 209, 226 (1st Cir. 1989) (this position "is consistent with that of every other federal appellate court that has addressed this issue"), vacated on other grounds, 498 U.S. 954 (1990); United States v. Trujillo, 714 F.2d 102, 105-06 (11th Cir. 1983) (collecting cases). Furthermore, "[t]his proscription is invariant; it makes no difference that the jury inquired, or that an aggressive lawyer managed to pique a particular jury's curiosity by mentioning the subject in closing argument, or that a napping prosecutor failed to raise a timely objection to that allusion." Sepulveda, 15 F.3d at 1190.

During the closing arguments in Sepulveda one of the defendants' attorneys invited the jury to "send out a question" concerning jury nullification; the jury did so, requesting the trial judge to "[c]larify the law on jury nullification." Id. at 1189. The judge responded with the following, which was affirmed by the First Circuit:

> Federal trial judges are forbidden to instruct on jury nullification, because they are required to instruct only on the law which applies to a case. As I have indicated to you, the burden in each instance which is here placed upon the Government is to prove each element of the offenses . . . beyond a reasonable doubt, and in the event the Government fails to sustain its burden of proof beyond a reasonable doubt as to any essential element of any offense charged against each defendant, it has then failed in its burden of proof as to such defendant and that defendant is to be acquitted. In short, if the Government proves its case against any defendant, you *should* convict that defendant. If it fails to prove its case against any defendant you *must* acquit that defendant.

Id. at 1189-90 (emphases added). Judge Selya explained that the "contrast in directives" in the last two sentences, "together with the court's refusal to instruct in any detail about the doctrine of jury nullification, left pregnant the possibility that the jury could ignore the law if it so chose." Id. at 1190.

1.02 Nature of Indictment; Presumption of Innocence

[Updated: 6/14/02]

This criminal case has been brought by the United States government. I will sometimes refer to the government as the prosecution. The government is represented at this trial by an assistant United States attorney, [_____]. The defendant, [_____], is represented by [his/her] lawyer, [_____]. [*Alternative:* The defendant, [_____], has decided to represent [him/herself] and not use the services of a lawyer. [He/She] has a perfect right to do this. [His/Her] decision has no bearing on whether [he/she] is guilty or not guilty, and it should have no effect on your consideration of the case.]

[Defendant] has been charged by the government with violation of a federal law. [He/She] is charged with [*e.g.*, having intentionally distributed heroin]. The charge against [defendant] is contained in the indictment. The indictment is simply the description of the charge against [defendant]; it is not evidence of anything. [Defendant] pleaded not guilty to the charge and denies committing the crime. [He/She] is presumed innocent and may not be found guilty by you unless all of you unanimously find that the government has proven [his/her] guilt beyond a reasonable doubt.

[*Addition for multi-defendant cases:* The defendants are being tried together because the government has charged that they acted together in committing the crime of [_____]. But you will have to give separate consideration to the case against each defendant. Do not think of the defendants as a group.]

Comment

This instruction is derived from Federal Judicial Center Instruction 1.

1.03 Previous Trial

[Updated: 6/14/02]

You may hear reference to a previous trial of this case. A previous trial did occur. But [defendant] and the government are entitled to have you decide this case entirely on the evidence that has come before you in this trial. You should not consider the fact of a previous trial in any way when you decide whether the government has proven, beyond a reasonable doubt, that the defendant committed the crime.

Comment

(1) This instruction is derived from Ninth Circuit Instruction 2.09, Federal Judicial Center Instruction 14, and Sand, et al., Instruction 2-13. The commentary to the Ninth Circuit and Federal Judicial Center instructions both recommend that this instruction not be given unless specifically requested by the defense. See also United States v. Seals, 987 F.2d 1102, 1109-10 (5th Cir. 1993) (finding it was not error to fail to instruct the jury when defense counsel refused trial court's offer to give instruction following inadvertent references to the defendant's previous trial).

(2) The District of Columbia Circuit has suggested that the following cautionary instruction be given at the *outset* of a retrial: "The defendant has been tried before. [If there has been a mistrial, so state.] You have no concern with that. The law charges you to render a verdict solely on the evidence in this trial." Carsey v. United States, 392 F.2d 810, 812 (D.C. Cir. 1967) (finding defense counsel's mention of "mistrials" did not substantially prejudice the prosecution and prevent a fair trial, so that the trial judge should have handled the matter through a cautionary instruction instead of declaring a mistrial); see also United States v. Hykel, 461 F.2d 721, 726 (3d Cir. 1972) (affirming instruction given after mention during jury selection of previous mistrial; instruction cautioning jury that "[T]he fact that this is the second trial of this case should mean nothing to you. Do you understand that? No inference of any kind should be drawn from that."); cf. United States v. Faulkner, 17 F.3d 745, 763-64 (5th Cir. 1994) (affirming court's statement to jury about true reason for mistrial in context of newscasts erroneously reporting that previous trial ended in mistrial due to jury tampering).

1.04 Preliminary Statement of Elements of Crime

[Updated: 6/14/02]

In order to help you follow the evidence, I will now give you a brief summary of the elements of the crime[s] charged, each of which the government must prove beyond a reasonable doubt to make its case:

First, [_____];
Second, [_____];
Third, [_____];
etc.

[The description of the crime in this preliminary instruction should not simply track statutory language but should be stated in plain language as much as possible.]

You should understand, however, that what I have just given you is only a preliminary outline. At the end of the trial I will give you a final instruction on these matters. If there is any difference between what I just told you, and what I tell you in the instruction I give you at the end of the trial, the instructions given at the end of the trial govern.

Comment

This instruction is derived from Eighth Circuit Instruction 1.02 and Ninth Circuit Instruction 1.02.

1.05 Evidence; Objections; Rulings; Bench Conferences

[Updated: 6/14/02]

I have mentioned the word "evidence." Evidence includes the testimony of witnesses, documents and other things received as exhibits, and any facts that have been stipulated—that is, formally agreed to by the parties.

There are rules of evidence that control what can be received into evidence. When a lawyer asks a question or offers an exhibit into evidence, and a lawyer on the other side thinks that it is not permitted by the rules of evidence, that lawyer may object. This simply means that the lawyer is requesting that I make a decision on a particular rule of evidence.

Then it may be necessary for me to talk with the lawyers out of the hearing of the jury, either by having a bench conference here while the jury is present in the courtroom, or by calling a recess. Please understand that while you are waiting, we are working. The purpose of these conferences is to decide how certain evidence is to be treated under the rules of evidence, and to avoid confusion and error. We will, of course, do what we can to keep the number and length of these conferences to a minimum.

Certain things are not evidence. I will list those things for you now:

(1) Statements, arguments, questions and comments by lawyers representing the parties in the case are not evidence.

(2) Objections are not evidence. Lawyers have a duty to their client to object when they believe something is improper under the rules of evidence. You should not be influenced by the objection. If I sustain an objection, you must ignore the question or exhibit and must not try to guess what the answer might have been or the exhibit might have contained. If I overrule the objection, the evidence will be admitted, but do not give it special attention because of the objection.

(3) Testimony that I strike from the record, or tell you to disregard, is not evidence and must not be considered.

(4) Anything you see or hear about this case outside the courtroom is not evidence, unless I specifically tell you otherwise during the trial.

Furthermore, a particular item of evidence is sometimes received for a limited purpose only. That is, it can be used by you only for a particular purpose, and not for any other purpose. I will tell you when that occurs and instruct you on the purposes for which the item can and cannot be used.

Finally, some of you may have heard the terms "direct evidence" and "circumstantial evidence." Direct evidence is testimony by a witness about what that witness personally saw or heard or did. Circumstantial evidence is indirect evidence, that is, it is proof of one or more facts from which one

can find or infer another fact. You may consider both direct and circumstantial evidence. The law permits you to give equal weight to both, but it is for you to decide how much weight to give to any evidence.

Comment

This instruction is derived from Federal Judicial Center Instruction 1, Eighth Circuit Instructions 1.03, 1.07 and Ninth Circuit Instructions 1.05, 1.06.

1.06 Credibility of Witnesses

[Updated: 6/14/02]

In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You may believe everything a witness says or only part of it or none of it.

In deciding what to believe, you may consider a number of factors, including the following: (1) the witness's ability to see or hear or know the things the witness testifies to; (2) the quality of the witness's memory; (3) the witness's manner while testifying; (4) whether the witness has an interest in the outcome of the case or any motive, bias or prejudice; (5) whether the witness is contradicted by anything the witness said or wrote before trial or by other evidence; and (6) how reasonable the witness's testimony is when considered in the light of other evidence which you believe.

Comment

This instruction is derived from Eighth Circuit Instruction 1.05 and Ninth Circuit Instruction 1.07.

1.07 Conduct of the Jury

[Updated: 6/14/02]

To insure fairness, you as jurors must obey the following rules:

First, do not talk among yourselves about this case, or about anyone involved with it, until the end of the case when you go to the jury room to decide on your verdict;

Second, do not talk with anyone else about this case, or about anyone who has anything to do with it, until the trial has ended and you have been discharged as jurors. "Anyone else" includes members of your family and your friends. You may tell them that you are a juror, but do not tell them anything about the case until after you have been discharged by me;

Third, do not let anyone talk to you about the case or about anyone who has anything to do with it. If someone should try to talk to you, please report it to me immediately;

Fourth, during the trial do not talk with or speak to any of the parties, lawyers or witnesses involved in this case—you should not even pass the time of day with any of them. It is important not only that you do justice in this case, but that you also give the appearance of doing justice. If a person from one side of the lawsuit sees you talking to a person from the other side—even if it is simply to pass the time of day—an unwarranted and unnecessary suspicion about your fairness might be aroused. If any lawyer, party or witness does not speak to you when you pass in the hall, ride the elevator or the like, it is because they are not supposed to talk or visit with you;

Fifth, do not read any news stories or articles about the case or about anyone involved with it, or listen to any radio or television reports about the case or about anyone involved with it;

Sixth, do not do any research, such as consulting dictionaries or other reference materials, and do not make any investigation about the case on your own;

Seventh, if you need to communicate with me simply give a signed note to the [court security officer] to give to me; and

Eighth, do not make up your mind about what the verdict should be until after you have gone to the jury room to decide the case and you and your fellow jurors have discussed the evidence. Keep an open mind until then.

Comment

This instruction is derived from Eighth Circuit Instruction 1.08 and Ninth Circuit Instruction 1.08.

1.08 Notetaking

[Updated: 6/14/02]

I am going to permit you to take notes in this case, and the courtroom deputy has distributed pencils and pads for your use. I want to give you a couple of warnings about taking notes, however. First of all, do not allow your note-taking to distract you from listening carefully to the testimony that is being presented. If you would prefer not to take notes at all but simply to listen, please feel free to do so. Please remember also from some of your grade-school experiences that not everything you write down is necessarily what was said. Thus, when you return to the jury room to discuss the case, do not assume simply because something appears in somebody's notes that it necessarily took place in court. Instead, it is your collective memory that must control as you deliberate upon the verdict. Please take your notes to the jury room at every recess. I will have the courtroom deputy collect them at the end of each day and place them in the vault. They will then be returned to you the next morning. When the case is over, your notes will be destroyed. These steps are in line with my earlier instruction to you that it is important that you not discuss the case with anyone or permit anyone to discuss it with you.

Comment

(1) "The decision to allow the jury to take notes and use them during deliberations is a matter within the discretion of the trial court." United States v. Porter, 764 F.2d 1, 12 (1st Cir. 1985). The trial judge, however, should explain to jurors that the notes should only be used to refresh their recollections of the evidence presented and "not prevent [them] from getting a full view of the case." United States v. Oppon, 863 F.2d 141, 148 n.12 (1st Cir. 1988).

(2) The district court is within its discretion to limit when the jurors may take notes during the trial. United States v. Dardea, 70 F.3d 1507, 1537 (1st Cir. 1995) (affirming trial court's decision to allow jurors to take notes only when viewing exhibits so as not to distract them from live testimony).

1.09 Outline of the Trial

[Updated: 6/14/02]

The first step in the trial will be the opening statements. The government in its opening statement will tell you about the evidence that it intends to put before you, so that you will have an idea of what the government's case is going to be.

Just as the indictment is not evidence, neither is the opening statement evidence. Its purpose is only to help you understand what the evidence will be and what the government will try to prove.

[After the government's opening statement, [defendant]'s attorney may, if [he/she] chooses, make an opening statement. At this point in the trial, no evidence has been offered by either side.]

Next the government will offer evidence that it says will support the charge[s] against [defendant]. The government's evidence in this case will consist of the testimony of witnesses, and may include documents and other exhibits. In a moment I will say more about the nature of evidence.

After the government's evidence, [defendant]'s lawyer may [make an opening statement and] present evidence in the [defendant]'s behalf, but [he/she] is not required to do so. I remind you that [defendant] is presumed innocent, and the government must prove the guilt of [defendant] beyond a reasonable doubt. [Defendant] does not have to prove [his/her] innocence.

After you have heard all the evidence on both sides, the government and the defense will each be given time for their final arguments. I just told you that the opening statements by the lawyers are not evidence. The same applies to the closing arguments. They are not evidence either. In their closing arguments the lawyers for the government and [defendant] will attempt to summarize and help you understand the evidence that was presented.

The final part of the trial occurs when I instruct you about the rules of law that you are to use in reaching your verdict. After hearing my instructions, you will leave the courtroom together to make your decisions. Your deliberations will be secret. You will never have to explain your verdict to anyone.

Comment

(1) This instruction is derived from Federal Judicial Center Instruction 1.

(2) The third paragraph should be omitted if the defense reserves its opening statement until later. The judge should resolve this issue with the lawyers before giving the instruction.